No. 83-18

In The

# Supreme Court of the United States

October Term, 1984

DUN & BRADSTREET, INC.,

*Petitioner,*

vs.

GREENMOSS BUILDERS, INC.,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of Vermont**

## SUPPLEMENTAL BRIEF OF RESPONDENT ON REARGUMENT

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## STATEMENT OF THE CASE

### 1. The Facts

The Statement of Facts contained in Greenmoss' initial brief will not be repeated here. However, certain details should be amplified and several misapprehensions of the facts set forth in D & B's Supplemental Brief should be corrected.

Since D & B failed to make any attempt to follow its own internal requirements of verifying with the putative "bankrupt" the truth of the bankruptcy information, Greenmoss learned of the bankruptcy notice by sheer fortuity. The Howard Bank, which was a significant creditor of Greenmoss, advised Greenmoss that it had receved the bankruptcy notice during the course of a meeting at which Greenmoss' president was seeking a loan. Greenmoss' previous loan requests with the bank had been granted, but, as Greenmoss' president testified and as the Vermont Supreme Court found, the bank suspended consideration of the loan request because of the bankruptcy report. The uncontroverted fact is that, despite an otherwise unblemished credit history with the bank, Greenmoss' loan request was rejected and, in close temporal proximity to the bankruptcy notice, the bank requested Greenmoss to take its banking business elsewhere. After the rejection of credit by The Howard Bank, Greenmoss was able to set up a banking relationship with the Chittenden Trust Company with little apparent difficulty. The Chittenden Trust Company was not a subscriber to the D & B service and had no knowledge of the bankruptcy report. These facts evidently were important to the jury since during deliberations the jury asked whether the Chittenden Trust Company had any knowledge of the bankruptcy report. (Tr. 495-96, 498-99).

D & B's assertion that none of the recipients of the special notice of bankruptcy was a "customer" of Greenmoss, avoids the fact that, conceivably worse from Greenmoss' standpoint, each of the recipients of the report was a creditor and The Howard Bank was Greenmoss' "life blood" creditor since it was Greenmoss' primary bank.

The evidence yields some insight into the service D & B provides. D & B does not open its credit reporting service to the public at large. In fact, only those whom D & B feels are "legitimate business concerns" can qualify as subscribers. (Tr. 346). Attorneys at law, for example, cannot, according to D & B's own witnesses, be subscribers. (Tr. 346). Even a "legitimate business concern" cannot buy a single D & B report on one customer but must instead buy an entire subscription service. (Tr. 346-47, 373-74). It is a requirement of the contractual arrangement with D & B and the subscriber that the subscriber hold the information it receives in confidence. (Tr. 349). A sample of D & B's subscription service agreement is set forth in Appendix A to the Amicus Curiae Brief of Sunward Corporation. With the exception of one industry (the apparel industry) D & B offers no recommendation or opinion in its reports about the creditworthiness of those about whom it reports. (Tr. 357-58).

Thus, this case involves defamatory statements made not to the public at large with whom Greenmoss may have had no dealings but rather very specific and precise factual information, on its face devoid of opinion or analysis, from a major force in the business credit reporting industry purposefully directed at those with whom Greenmoss had a present and continuing relational interest. There is here, unlike previous cases before the Court, relevant relational communications of fact made through "private" channels rather than through "public" channels by a speaker motivated solely by profit incentive which is in the business of selling such reports to private subscribers whom it screens in advance according to its own standards of legitimacy.



Greenmoss' case focused on the manner in which D & B collected the information about the bankruptcy, the economic harm wrought by the notice and, in an approach apart from the defamation, D & B's conduct toward Greenmoss after the defamation.

Although Greenmoss never solicited a D & B rating, its ratings had steadily improved prior to the bankruptcy notice. Indeed, the last report which D & B had on file concerning Greenmoss prior to the bankruptcy notice showed Greenmoss as having a net worth of $30,000 with $122,000 in assets and $93,000 in *secured* liabilities. D & B knew Greenmoss had a "clear history" and a "good relationship" with its bank. The report of bankruptcy presented gross deviations from these facts since if the report were to be taken as true, not only did the assets go down by almost $96,000 but the liabilities, which D & B knew were *secured,* also went down by some $56,000. When both assets and *secured* liabilities diminshed by such dramatic amounts, there were apparent reasons to doubt the veracity of the "correspondent" and to conclude that the allegations of bankruptcy were inherently improbable.

The failure to attempt prepublication verification involved more than a mere failure to investigate; it demonstrated a failure to observe previously established systems for assessing the reliability of one source of information.

D & B offered no evidence that the verification procedure, if followed, would in any way delay circulation of the report. There was no evidence that the bankruptcy

report was analyzed by D & B's supervisory personnel or subjected to any editorial or analytical process prior to its publication.

D & B broadly suggests that there was "no" evidence of a causal connection between the defamatory report and Greenmoss' lost profits. This conclusion is not borne out by the record. Greenmoss' president testified extensively as to the absence of any reasons other than the bankruptcy notice for Greenmoss' lost profits. He also testified concerning the absence of reasons other than the bankruptcy notice why The Howard Bank would sever its relationship with Greenmoss. Additionally, the timing between the bankruptcy notice and Greenmoss' loss of the bank's credit relationship in the face of a clear prior history was before the jury.[1]

Greenmoss presented damage claims based on lost profits and out-of-pocket expenditures made to correct the harm caused. Thus, more intangible compensatory damages permissible under *Gertz's* ambit of actual damages such as impairment of standing in the community and humiliation were not the basis for recovery. *Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974). D & B engaged in extensive pre-trial discovery and disclosure of the factual basis for Greenmoss' claims and did not claim surprise at trial. It had unfettered cross-examination of Greenmoss' lost profits analysis and chose to call no witnesses on its own to rebut or question Greenmoss' figures.

[1]D & B's assertion that Greenmoss did not call any of the recipients of the bankruptcy notice is misleading. The facts are that, as a courtesy to D & B, Greenmoss allowed it to call a Howard Bank officer to testify during Greenmoss' direct case (Tr. 210). Greenmoss' cross-examination of that witness and the documentary evidence submitted through him supplanted any need to call other Howard Bank employees to substantiate Greenmoss' position.



The trial Court specifically found the evidence was sufficient to create issues of fact for the jury concerning both liability and damages and the Vermont Supreme Court upheld that determination. (J.A. 25, 43-46).

The charge D & B finds objectionable is reprinted at pages 17-21 of the Joint Appendix. That it should be construed as a whole rather than in piecemeal fashion is axiomatic. There are, however, significant features of the charge which D & B does not highlight. The methodological formula of the charge was to instruct that the facts contained in the bankruptcy notice constituted libel "as a matter of law" (J.A. 17) unless the jury concluded that D & B was "privileged to make that report and publish it to subscribers." (J.A. 17-18). The privilege granted D & B was the special common law privilege extended only to credit reporting agencies and not available to other defamation defendants. Greenmoss was assessed the burden of surmounting the barrier of the privilege and if it failed, no plaintiff's verdict could be recovered. On two occasions, the jury was specifically advised that *mere negligence* was not a high enough standard to supersede the privilege and a higher category of fault was needed to return any verdict for the Plaintiff. (J.A. 18-19). It was only if the jury found that Greenmoss' proof defeated the privilege that damages could then be considered. (J.A. 19). It is noteworthy that the Court instructed the jury concerning a *defendant's* verdict and provided both a plaintiff's and defendant's verdict form. (Tr. 490-91). If this litigation was, in fact, a case of presumed damages assessed without regard to fault, a defendant's verdict would be precluded.[2]

[2]At the conclusion of the charge, the Court again admonished the jury that it was not mandatory that it consider the question of damages (Tr. 491).

To support its contention that the compensatory damage award was somehow based on presumption, D & B claims that the evidence of lost profits and expenditures caused by D & B's wrongdoing total only $36,000 instead of the $50,000 awarded by the jury. (Brief of Petitioner 7-8). This claim fails to consider that the charge also provided the jury the right to award a sum in lieu of interest, as is permitted under Vermont law, on the damages found from the time of injury, July 26, 1976, to the date of the verdict, April 10, 1980. (Tr. 491). A sum in lieu of interest could be awarded, under the language of the charge, at the Vermont statutory rates of 8½% per annum until July 1, 1979 and then at 12% per annum from July 1, 1979 to the date of the verdict. (Tr. 491). Even under D & B's calculation of the actual damages at $36,000, consideration and calculation of interest, when added to the damage figure asserted by D & B, yields a total compensatory damage figure, as of the date of the verdict, of approximately $50,022.30. This is virtually the amount awarded by the jury for compensatory damages which the trial Court referred to in its charge as "actual" damages.

Secondly, D & B's analysis of the components of the compensatory award is limited to consideration of lost profits for only a one-year period. Greenmoss introduced evidence that the lost profits in the succeeding year were an additional $42,000. (Tr. 99, 104).

The Court precluded an award of substantial damages unless the jury was persuaded by a preponderance of the evidence that substantial damages had "*in fact* occurred". (J.A. 19). The next sentence of the charge suggested a verdict of nominal damages "such as one dollar" unless Greenmoss proved damages that were "*actually caused*" by the Defendant. (J.A. 19). We, therefore, disagree with the characterization of the charge



that it gave the jury full discretion to award damages in whatever amount it chose.[3]

D & B's reference to the amounts asserted in the *ad damnum* of Greenmoss' Complaint is most curious. Aside from the fact that in Vermont, as elsewhere, the amount asserted the *ad damnum* clause is not relevant to any issue aside from the jurisdictional prerequisite of the court where the action is filed,[4] there are cogent reasons, as set forth in Appendix A, for a non-inflammatory *ad damnum* in a case such as this.

The post-defamation conduct of D & B was a focal point of this trial. D & B did not object on any grounds, including relevance, to the introduction of this testimony. After Greenmoss' fortuitous discovery of the defamation, it located, after some difficulty, the D & B office responsible for circulating the report. Greenmoss' efforts to obtain an effective, unambiguous corrective report, its objections to the form of the corrective notice sent by D & B, its frustrations in obtaining the identity or even the number of business entities who received the report and other dealings between the parties functionally separate from the circulation of the bankruptcy notice are outlined in Greenmoss' Brief at pages 2-5. D & B's witnesses admitted that they knew at the time of the initial discussions with Greenmoss and thereafter the entities to whom the reports had been sent. (Tr. 450-51). D & B never offered a rationale for refusing to provide this

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[3]Gertz establishes the rule that for actual damages there need be no evidence which assigns an actual dollar amount to the injury. 418 U.S. at 350.

[4]The amount of damages alleged in the Complaint is "not a standard for estimating the damages". *Dupona v. Benny*, 130 Vt. 281, 284, 281 A. 2d 404, 407 (1972). In recognition of such considerations, the plaintiff in *Gertz v. Robert Welch, Inc.*, sought, in his action filed in Federal Court, the sum of $10,001 in actual damages. *See*, Anderson, *Libel and Self-Censorship*, 53 Tex. L. Rev. 422, 442 n. 88 (1975).

information but acknowledged at oral argument before this Court that this practice has been discontinued. Businesses which are the subject of false reports by D & B are now given this information. (Tr. Oral Argument, March 21, 1984 at 28).

The Court's instructions on punitive damages explained the rationale for such damages and advised the jury to consider the conduct of the Defendant both before and after the publication in considering whether punitive damages were appropriate. Any steps to mitigate Greenmoss' damage were to be considered by the jury on the threshold question of *whether* to award punitive damages, not on the question of what amount of punitive damages should be awarded.

Finally, Greenmoss takes very strong exception to D & B's comparison of the charge in the instant case with the charge before the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Among other things, the trial Court in this case never advised the jury that malice was presumed. Quite to the contrary, proof of malice was part of Greenmoss' burden. Secondly, the verdict slips were crafted with the cooperation of counsel so that, in clear contrast to the instructions before this Court in *New York Times*, in the event of a plaintiff's verdict, punitive damages could not be awarded without a finding and verdict of compensatory damages. (Tr. 490-91 and Jury Verdict Tr. 502).

## SUMMARY OF ARGUMENT

The rules in *Gertz* were fashioned to apply solely to the media. To extend these rules to non-media defendants would improperly depreciate reputational interests and would protect all speech irrespective of whether the communication has any constitutionally recognized value



whatsoever. *Gertz* should be viewed in the context of its contribution to the purposes of the First Amendment enunciated in *New York Times;* to protect public debate about public issues. The expansion of *Gertz* to non-media defendants to protect all of their speech is not appropriate.

Totally apart from *Gertz,* this case should be viewed as a commercial speech case. The principles behind the commercial speech doctrine are fully applicable here. A holding that this speech is commercial speech would be a positive contribution in the development of the commercial speech doctrine. A holding that it is not commercial speech would have untoward consequences for the regulation of commercial activity.

## ARGUMENT

### I. The Constitutional Rule Of New York Times And Gertz With Respect To Presumed And Punitive Damages Should Not Apply Where The Suit Is Against A Non-Media Defendant.

#### A. The Rational For The Gertz Limitations Preclude Its Application To Non-Media Defendants.

D & B has stood the *Gertz* and *New York Times* balancing approach on its head. D & B's analysis *begins* with its dislike of common law rules and proceeds directly to the tension *Gertz* and *New York Times* recognize between those rules and the First Amendment.

In so doing, it has avoided the tougher question of whether the First Amendment applies where the speaker is not a media speaker and the plaintiff is not a public official or public figure. It is basic to any analysis of these issues to recognize that *Gertz* set down broad principles of general application. 418 U.S. at 343-44. The applica-

tion of *Gertz* to non-media defendants must, therefore, be discussed in terms of those broad principles.

Consistent with the balancing approach utilized in First Amendment methodology, D & B must identify a valid First Amendment interest *before* consideration of the state's interests in reputational protection and the wisdom of the common law is relevant. We submit that such a showing has not been made in this case.

Greenmoss' earlier brief discussed the absence of relevant First Amendment interests in non-media defamation. Respondent's Brief at 30-33.

The true radicalism of D & B's approach can be seen by the development of the Court's cases prior to *Gertz*.[5] The Court announced in *New York Times* that the central meaning of the First Amendment in the context of defamation is that public debate about public issues should be uninhibited, robust, and wide-open. In a preliminary step to ensure this result, the Court erected a constitutional privilege protecting good faith critics of the official conduct of public officials from defamation suits. In the decisions which followed, the constitutional privilege was extended to defamation of public figures involved in public issues and ultimately (by a plurality) to defamation of private individuals involved in a matter of public concern. Each of these extensions was an expansion of the con-

[5]D & B's syllogistic, result oriented argument basically decries the fact that it is not subject to the same rules as other defamation litigants. If the Court extends D & B protection on that basis, it would take little ingenuity for public figures or public officials to challenge the rules concerning the constitutional barriers they face in defamation actions on the grounds that they are subject to different constitutional disabilities than private plaintiffs if they commence defamation actions. The common ground of both arguments is that certain classes of litigants receive different treatment under the First Amendment than do others. As we point out *infra*, this is a specious argument.



stitutional privilege toward the boundaries of the First Amendment theory enunciated in *New York Times*. Each was designed to protect public speech on matters of public concern and each preserved traditional state remedies where the speech at issue was not of public concern. *See* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1412 (1975).

By abandoning the "matter of general or public interest" standard of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the various rules announced by the majority in *Gertz* relating to private defamation plaintiffs apply even when a private individual has been defamed by a media communication which is of no public interest whatever. The rules in *Gertz*, we submit, were clearly meant to apply in defamation suits only against the press. Eaton, *supra*, at 417. *Gertz* is within the rationale of *New York Times* and its progeny only when its holding is limited to the media and when one applies to *Gertz*, in the aftermath of *Rosenbloom*, the consideration that the news media ought not to be put to the task of assessing whether a court would ultimately find its news report to be in the public interest or of private interest only. The difficulty of making such a determination by those who do not necessarily have any self-interest in the speech itself could cause the media to steer wide of the unlawful zone, resulting in self-censorship on matters in the public interest. In order to insure that state law does not suppress information concerning matters of public concern, *Gertz* found it necessary to provide constitutional protection for information in the media which may be of minimal public interest. Eaton, *supra*, at 1415 and n. 264. It announces, in that sense, very broad prophylactic rule.

An analysis of *Gertz* which brings its rationale into harmony with the consistent development of First Amendment doctrine is that *Gertz* extends the coverage of the First Amendment to public speech. *See* Eaton, *supra,* 1408, 1412-18, Tr. Oral Argument, 36. *Gertz* is an enunciation of the precept that public speech is what is at issue when First Amendment claims are made in defamation cases. Using the "broad rules of general application" approach, the me a typically and generally engages in public speech and thus is worthy of constitutional protection, *Gertz, supra,* at 343-44. Speech concerning public officials and public figures is public speech and, therefore, entitled to the constitutional privilege of *New York Times.* Speech on a matter of legitimate public concern, i.e. one which is relevant to the business of governing or to the functioning of democratic institutions should also be categorized as public speech. *See* Eaton, *supra,* at 1408; Lewis, *New York Times v. Sullivan Reconsidered: Time To Return to the Central Meaning of the First Amendment,* 83 Colum. L. Rev. 603, 622-623 (1983). Private speech such as limited communications or private conversations not touching on issues of the business of government would be left to the evolution of state dafamation law.

Whether speech is relevant to public affairs, i.e. whether it is public speech, must always be a critical question in determining the level of constitutional protection in libel actions. This is different than saying that such speech is of general or public interest. Analyzing *Gertz* as part of the continuing evolution toward protecting public debate about public issues from self-censorship reaction would not, in any sense, resurrect the public or general interest test of the *Rosenbloom* plurality because it would not permit the *New York Times* shield to extend to mere



public curiosity about private matters and would not permit public speech to equal "newsworthiness" or permit mere dissemination of information, by its own force, to bootstrap the disseminator into the "majestic protection of the First Amendment". Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker,* 1967 Sup. Ct. Rev. 267, 284; Eaton, *supra,* at 1402-03; Lewis, *supra,* at 624. Considering *Gertz* in such terms and focusing upon the speech before the Court in *Gertz* would retain fidelity to the original concern that brought the Constitution into the area of defamation in 1964: protection for the function of the "citizen critic of government". *New York Times v. Sullivan,* 376 U.S. at 282.

As the *Gertz* majority believed, there is a need to have a far brighter line than speech "in the general or public interest." But considering *Gertz* as creating a dividing line between public speech and private speech in terms of its nexus to public affairs is a meaningful line. Certainly on the facts of *Gertz* (article about a nationwide communist conspiracy) relevance to the appropriate functioning of our democracy was apparent.

Since values of reputation and speech both command respect, however, lines will have to be drawn somewhere. *See* Lewis, *supra,* at 624.

Line drawing is what the Court must do in this case lest by expanding *Gertz,* it broadens *New York Times* beyond even the limits of *Rosenbloom.* The goal is to draw lines which permit analytical distinctions based on principles that do not admit of partisan bias. The fact that such lines must be drawn is not a valid reason to abandon the inquiry in the first place. As Mr. Justice Holmes put it "where to draw such lines is the question in pretty much everything worth arguing in the law". *Irwin v. Gavit,* 268 U.S. 161, 168 (1925).

In a related area the Court has recently held that the protection afforded public employees extends only to speech of such employees in their employment capacity which is addressed to matters of legitimate public concern. *Connick v. Meyers*, 103 S. Ct. 1684 (1983). Statements which do not touch on such matters may be considered unprotected speech in the sense that employment related sanctions may be imposed on the basis of such statements. *See Bose v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1962, n. 22 (1984).

The public nature of media communication within the broad gendre-based generalities which predicate the majority opinion in *Gertz* justifies extending First Amendment protection to it. The first remedy for false media speech is not silence but more speech. Objectionable public statements via the media generally may be countered with "more speech". This is not usually the case with respect to non-media speech where the fact of the communication itself may not be known until it is too late to counter it by corrective speech or other action. See Nimmer, *Is Freedom of the Press a Redundancy? What Does It Add to Freedom of Speech*, 26 Hast. L. J. 639, 656 (1975).

In support of the proposition that the *Gertz* doctrine should be limited to media expression, Professor Nimmer also points out that defamatory statements appearing in the media generally consist of expressions by persons not themselves connected with the media identified in the media as "news". In such circumstances, the speech values of self-fulfillment and, to some extent, democratic dialogue and safety valves which pertain to the speech of the person quoted are combined with the considerable democratic dialogue press interest. Together, these may be said to outweigh the counterinterest in reputation. Nimmer, *supra*, at 655. The balance might shift in favor of reputation if the democratic dialogue press interest is removed as would be the case in non-media defamatory speech. These considerations emphasize the public nature of the press as against the more personal or private nature of typical non-media speech.



This is not to say that there are not non-media speakers who speak out on public issues. It is to say, however, that a case such as *Gertz* which was specifically crafted and developed to deal with the media should not, solely in the interest of symmetry, be used as a springboard to apply the *New York Times* doctrine to all speech whether media or non-media. To do so would be to do violence to the *New York Times* doctrine. Paradoxically, it would even do violence to the theory of the plurality in *Rosenbloom* since, if the first question presented by this Court's July 5, 1984 Order is answered in the affirmative, the *New York Times/Gertz* rule will apply irrespective of whether the speech is in the public or general interest. There is an unsettling irony in the ruling sought by D & B and in the contention that the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant irrespective of any other considerations. As Justice Rehnquist commented in *Bose v. Consumers Union of the United States, Inc., supra*:

> It is ironic . . . that a constitutional principle which originated in *New York Times v. Sullivan*, 376 U.S. 254 (1964) because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loud speaker system.

104 S. Ct. at 1967-68. Secondly, many commentators have concluded that *Gertz* constituted a retrenchment in First

Amendment theory and brought to a halt the momentum of a more expansive extension of *New York Times*. *See* Anderson, *Libel and Self-Censorship,* 53 Tex. L. Rev. 422, 451-52 (1975); Brosnaham, *From Times v. Sullivan* to *Gertz v. Welch: Ten Years of Balancing Libel and the First Amendment,* 26 Hast. L. J. 777, 789-90 (1975). *Gertz* and subsequent cases have been identified as a departure from the *New York Times* approach of focusing on the demands of the First Amendment and instead focus on the legitimate state interests in the law of defamation. Brosnahan, *supra,* at 787. In terms of the protection of the First Amendment, *Rosenbloom* can be seen as the highwater mark in the expansion of the First Amendment in the defamation area. Although *Rosenbloom* has been criticized for permitting varying determinations of what is and what is not of general or public interest, the lower courts did develop under *Rosenbloom* only one clear category of communication that was not deemed to be within the *Rosenbloom* test: false credit reports. Ingber, *Defamation; A Conflict Between Reason and Decency,* 65 Va. L. Rev. 785, 840 at n. 242; Eaton, *supra,* at 1402, n. 223. *See* also, Brief of Respondent at 17-18 and cases cited therein. Consequently, if D & B is correct and this Court's July 5, 1984 question is answered in the affirmative, all speech of whatever nature will be protected under the *Times/Gertz* doctrine irrespective of whether it is public or private or whether it is speech in the general or public interest. Greenmoss submits that *Gertz* was never intended to countenance such a result and its doctrine only has application where the defendant is a non-media defendant.

Even if First Amendment interests recognized by this Court in the defamation context can be applied to non-media defendants within the doctrinal caveat of *Gertz* that broad rules of general application must be estab-



lished,[6] the demands of the First Amendment must then be weighed against legitimate state interests in the law of defamation. This concern is not merely rooted in respect for the common law but recognizes a profound concept of federalism that the protection of "private personality" is constitutional in dimension since it is left to the individual states under the Ninth and Tenth Amendments. *Gertz, supra,* at 341. The Court's high regard for reputation highlighted in *Gertz* is re-emphasized in *post-Gertz* cases dealing with public officials and public figures. *See Hutchinson v. Proxmire,* 443 U.S. 111, 119, n. 8, 135-36 (1979); *Wollston v. Readers Digest Assoc.,* 443 U.S. 157, 167-69 (1979); *Time, Inc. v. Firestone,* 424 U.S. 448, 454 (1976).

In the instant case, the defamation was directed to and constituted an invasion of presently, and previously existing relational interests which Greenmoss had with each and every recipient of the false credit report. All of the recipients of the report were entities with whom Greenmoss had business relations, for example, the insurance company which held Greenmoss' "key man" and shareholder's redemption insurance and the company which issued credit cards to Greenmoss. By the nature of its business, D & B either knew or had a high probability of knowing that these entities were creditors of Greenmoss. Consequently, we have an instance which graphically shows that damage inflicted by the thrust of the dagger may wound more mortally than the swipe of the broad axe. For this reason, we strongly disagree that the dissemination of def-

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[6]The Court has repeatedly recognized that each medium for communicating ideas and information presents its own particular problems and, therefore, analysis of First Amendment concerns implicated by a given medium must be senstitive to these particular problems and characteristics. *See* e.g., *Members of the City Council of the City of Los Angeles v. Vincent,* (Brennan, J. Dissenting) 104 S. Ct. 2118 (1984).

amation to a small number of individuals renders less significant the state interest in protecting against injury to reputation. On the contrary, we claim that the state's interests may be higher where the defamation reaches those with an established relat' nal interest with the victim than where the defamation reaches those to whom the plaintiff is unknown. *cf.*, Prosser, *Law of Torts*, §111, p. 743, n. 89, 744 (4th Ed. 1971).

The states, through the common law of defamation, also recognize that when the defamation is about certain defined categories, for example, the insolvency of a business, the intuition that harm has occurred coincides with common experience and reality. Prosser, *supra*, at 762-65.

Problems of proof are especially difficult in cases involving businesses. As the Colorado Supreme Court put it, "the rationale for the presumption of damages derives from the difficulty of proving damages in these instances":

> This is particularly true where the defamatory remarks relate to the conduct of an individual's business affairs. It is the rare case in which a slander will destroy business profits in such a way that the loss can be directly traced to the slanderous remark. *See Rowe v. Metz*, 579 P. 2d 283, 284 (1978).

There are other problems of proof which bear mentioning here. D & B's contracts with its subscribers bar revelation of D & B to anyone as a source reference. Secondly, business people are, for many reasons, reluctant to discuss the reasons why business decisions are made. Also, it is the rare businessman who will testify in court that his relationship toward the plaintiff changed as a result of the publication when by doing so he admits that he changed his opinion of the plaintiff without determining the truth or falsity of the statement. Eaton, *supra*, at 1357-58. Thirdly, in the diversity of American business, it is difficult to actually locate with the limited resources available



to a typical private plaintiff, all the individuals, even in one organization, who made or participated in the decision to withhold credit and present that testimony in an acceptable evidentiary form.

*Gertz* should not be read as barring the presumption that the defamation has proximately caused the loss or the presumption that *some* damage has occurred. Justice Powell's decision in *Gertz* calls into question only the states' interest in awarding substantial sums of money without any proof that such harm has actually occurred. Where the states' interests in compensating private individuals for reputational damage have a strong place, not explored by *Gertz*, is in making the causal link between demonstrated injury and the defamation, i.e., overcoming the plaintiff's most difficult proof problems of tracing demonstrable loss to the defamation. It is in the causality link and in bridging the proximate cause gap between the loss and the defamation that creates the problem for the defamed victim. This state interest is most legitimate and even if identifiable First Amendment rights extend to non-media defendants, this interest should outweigh the First Amendment interest.

Thus considered, the instant case is wholly different from *Gertz*. In *Gertz*, as Judge (now Justice) Stevens' opinion for the Seventh Circuit Court of Appeals points out, the plaintiff offered ***no proof of actual damages at all.*** *Gertz v. Robert Welch, Inc.*, 471 F. 2d 801, 804 (7th Cir. 1972), *Rev'd.*, 418 U.S. 323 (1974). Additionally, it does not appear that the jury in *Gertz* received any instruction concerning any common law privileges.

In Greenmoss, a three tiered progression preceded the verdict. The first tier was for the plaintiff to recover at all. To do this, more than mere negligence had to be

shown. If Greenmoss' proof met the test established by the trial Court, it was then entitled to some nominal amount of compensatory damages. The Court suggested one dollar as this amount. (J.A. 19).

The second tier for Greenmoss was to recover substantial compensatory damages. Compensatory damages were limited to lost profits and expenditures proximately caused by D & B's wrongdoing. Greenmoss had to prove that these damages "have in fact occurred" and were "actually caused" by the defendant. (J.A. 19). The quantum of proof for these two tiers was the preponderance of the evidence standard.

The third tier was punitive damages. Any punitive award could not be based on a presumption nor even on a preponderance of the evidence test but "on the basis of clear and convincing evidence". (J.A. 20). A failure to meet the proof required by the first tier would have meant a defendant's verdict and a form for such was provided to the jury by the trial Court. The punitive damage award did not focus on the speech but required the jury to assess whether "there has been outrageous conduct" (J.A. 21) or "actual malice". (J.A. 20). D & B's speech was not singled out for punitive damage treatment but rather "the conduct of the defendant both before and after the publication" was to be considered. (J.A. 20). As we have argued earlier, the punitive damages in this case were awarded for conduct entirely separate from the speech. (Brief of Respondent at 40-41). Therefore, the activity or conduct regulated in this case was not the speech itself. *cf.*, Brief of Dow Jones & Company as Amicus Curiae, at 10 and n. 4. After the requisite showing of fault has been made, *New York Times* and its progeny do permit presumed and punitive damages. *See* Eaton, *supra*, at 1386-90 and cases cited therein.



Considerations of federalism and the power and rights of the states must also be considered here since the necessary implication of an affirmative answer to the initial question posed by the Court and to the questions presented in D & B's petition will be to apply the First Amendment in all defamation litigation regardless of the status of the parties or the nature, character or viewpoint of the speech. The ruling sought by D & B effectively constitutionalizes all state laws of defamation and displaces the development of the common law. *Gertz's* expansion beyond non-media defendants could make all conditional common law privileges obsolete. Anderson, *supra,* at 443 and n. 97. The inappropriateness of such a standard for restricting both state and nation with respect to purely private defamation[7] not involving public speech is indicated by the disparity between state and federal functions and duties in relationship to freedoms of speech. *cf. Beauharnais v. Illinois,* 343 U.S. 250, 294-95 (1953).

The federal-state allocation of power in the Constitution reserves residual power to the states to regulate speech deemed injurious to person and property. *Gertz, supra,* at 341. Federally imposed standards, constitutional or otherwise, by their nature, create uniformity and leveling which may diminish the diversity that is conducive to new ideas. The plan of the framers of the Constitution was to enhance liberty by weakening government. To divide power is to weaken it and government power over speech is diminished as it is fragmented among the states. *See* Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression,* 84 Colum. L. Rev. 91, 131 (1984).

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[7]Purely private defamation, as used herein, signifies litigation involving a private plaintiff against a private, i.e., non-media defendant, where the issue does not involve public speech.

This would appear to be especially true where, as here, Vermont's regulation of this speech is viewpoint neutral. Professor Shiffrin sums up the point well when he says:

> Consider, for example, the case of a commercial supplier of credit information that defames a person applying for credit. *If the First Amendment requirements outlined in Gertz apply, there is something clearly wrong with the First Amendment or with Gertz.* The interests in individual self-expression, autonomy and the like are not present here or are present only in an attenuated way. The *constitutional* interest in affording strategic protection to these defamatory falsehoods in order to encourage investment in credit information suppliers is not impressive. *Nor are there general grounds for concern about government bias. Affording constitutional protection here would trivialize the First Amendment.*

Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment,* 78 Nw. U. L. Rev. 1212, 1268 (1984) (emphasis added).

This case presents a graphic example of the state's interest in punitive damages since D & B's practice of refusing to reveal the scope of the defamation was halted as a result of this litigation. But even if the First Amendment should apply here, it does not follow that the *Times* actual malice standard should be used for punitive damages. A sufficiently high standard was applied here to protect the minimal constitutional interests at stake.

### B. Considerations Of Self-Censorship Are Largely Absent With Non-Media Defendants.

Where the news media is involved, the majority in *Gertz* felt it necessary to extend First Amendment protection to avoid intolerable self-censorship even where the speech is of no public interest whatsoever. In arriving at this conclusion, the Court analyzed the common law



defenses available to media defendants and concluded that such defenses did not provide the media with sufficient protections against self-imposed restraints. *Gertz, supra,* at 340-42, 350. The specific fear expressed was that the concepts of presumed and punitive damages will be used selectively by juries to punish "unpopular views" and "unpopular opinion". *Id.* at 349, 350. Thus considered, the self-censorship fears derive not from the utilization of false facts themselves but from the use of those facts to advance a controversial or iconoclastic viewpoint or thesis. As will be pointed out *infra,* Dun & Bradstreet's speech is viewpoint neutral. The inquiry in this case must therefore focus on whether the threat of defamation liability will cause such self-censorship by non-media defendants and this Defendant in particular to extend the prohibition of *Gertz* against presumed and punitive damages to them. The question should not be whether there will be any self-censorship. The inquiry is twofold. First, whether there is a likelihood of self-censorship in non-media defamation and second, whether the perceived degree of self-censorship for this class of litigants is intolerable.

The Court's discussion of the dangers of self-censorship in *Gertz* refer exclusively to the press and broadcast media and do not address this concern in the case of other types of defendants. *See* Anderson, *Libel and Self-Censorship,* 53 Tex. L. Rev., 422, 442-43 n. 95. We posit that self-censorship is not a significant fear with non-media defendants. It is unlikely that this class of defendants will voluntarily sque[illegible]h or modify their own speech in advance or decide not to speak at all because of the fear of defamation suits.

The *Gertz* majority felt it necessary to lay down broad rules of general application to defamation actions but recognized the fact that not all of the considerations

which justify adoption of a given rule will obtain in each particular case. *Gertz, supra,* at 343-44.

Consistent with that approach, from a generic standpoint it can be concluded that media speakers are more likely to be deterred by defamation actions than are non-media speakers. First, non-media defendants generally have greater protection under state common law privileges than do media defendants. Franklin, *1980 American Bar Foundation Research Journal,* 457, 471.[8]

Media speakers are comparatively more likely to be aware of the libel laws since they have continuous access to legal advice, they are comparatively more likely to have financial resources sufficient to make them attractive defamation defendants and are comparatively more likely to cause the kind of damage which would encourage defamation suits in response.[9] Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology,* 25 U.C.L.A. L. Rev. 915, 933 (1978).

The typical media speaker may be unable to limit its communication to a small number of people. Indeed, such limitations may be contrary to its purpose. The typical non-media speaker, in contrast, can limit its communication to a select few. Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants,* 47 So. Cal. L. Rev. 902, 926 (1974).

Additionally, the heightened awareness and consciousness of media speakers to defamation is lacking in a typical non-media speaker. This may, of course, be a more

[8]The jury instructions in this case demonstrate that point since D & B received protection rooted in common law that perhaps no other defendant, media or non-media, would have received.

[9]The Franklin study points out that in non-media defamation cases, the defamation claim is often ancillary to other theories. Franklin, supra, 481-87.



subjective deterrent than an objective one, but the media speaker, perhaps because of the media's own emphasis about the issue of defamation, may feel confronted with only two choices; to publish or to remain silent. Thus, with a media defendant, the dragon of self-censorship may be a creature of his own construction whose appetite grows in inverse proportion to the degree of the media speaker's self-interest in the topic. In contrast, a non-media speaker may not confront the self-censorship issue, or having confronted the issue, conclude that it is not a meaningful consideration or, even if meaningful, believe that his self-interest in the speech outweighs any inducement for self-censorship.[10]

A defamed plaintiff's practical problems of proof may also embolden non-media speakers to engage in speech which is defamatory. In media defamation, it is rare when the identity and source of the defendant as the defamer is unknown or proves difficult to obtain.[11] The media by its very nature is open, public and exposed. Their publications are presented for all to see or read. Non-media speakers, as a class, do not have such exposure and vulnerability. As the court in *Grove v. Dun & Bradstreet,* 438 F. 2d 433 (3d Cir.) *cert. denied,* 404 U.S. 898 (1971) pointed out, in certain non-media defamations the source or nature of the defamation may never be exposed. *Id.* at 437. Witnesses, especially businessmen or those who extend credit may be reluctant by their nature and by fear of their own liability for acting on the basis of false infor-

[10]It has also been suggested that the protection for media defendants may be justified because these speakers serve a different function than non-media speakers and are subject to internal restraints. *See* Note, *First Amendment Protection Against Libel Actions, Distinguishing Media and Non-Media Defendants, supra,* at 929-938.

[11]We have pointed out previously that the common law recognizes the difficulty in proof in tracing business loss to a particular defamatory remark. *See Rowe v. Metz, supra.*

mation to candidly admit their reliance upon a falsehood. The non-media speaker, especially if it has strong economic incentives to disseminate the material, also has the opportunity to restrict its recipient's use of the information or to contractually bind its audience to non-disclosure. The news media cannot use such devices and in any event, such use would be self-defeating and probably ineffective. Many non-media speakers may therefore conclude that they might never be identified as the source of a defamation or even if identified, the victim may have significant problems of proof. These considerations may lessen fears of self-censorship for non-media speakers.

The concept of chilling First Amendment speech is more applicable to the institutional media which, when faced with questionable statements or opinions, will simply not publish the material. The media simply does not have the incentive, economic or otherwise, to publish anything that might lead to a libel suit. Anderson, *supra*, at 433.

The argument has been made that newspapers, magazines and broadcasting companies are businesses conducted for profit and like any other enterprise that inflicts damage in the course of performing a service highly useful to the public, like providers of food or transportation, they must "pay the freight". *See Buckley v. New York Post*, 373 F. 2d 175, 182 (2d Cir. 1967); *cf. Gertz*, 418 U.S. at 390-91. We submit there is a flaw in the analogy of the above argument. The flaw is that the other enterprises mentioned have no choice but to accept the additional risks of liability if they are to continue their profit making activities. In contrast, publishers and broadcasters, i.e. the media, can avoid liability without discontinuing their activities or reducing their profits by simply ceasing to carry or publish the material that creates the risk of



liability, i.e., increasing their self-censorship. Anderson, *supra*, 432 n. 52.[12]

When a non-media defendant speaks out on an issue of political or governmental import in a manner which gives a plaintiff standing to assert a defamation claim, the typical defamation plaintiff in this context would be a public official or a public figure and thus subject to the New York Times rule even as to compensatory damages. *See* e.g. Eaton, *supra*, at 1406.

Turning to the status of D & B in this action, we do not believe that D & B can legitimately advance self-censorship arguments. Indeed, any self-censorship argument advanced by it seems to center on the claim that absent a constitutional privilege, their information will have to be checked more carefully. (Tr. Oral Argument 7-8). We do not believe that this is the type of self-censorship considered by the Court in *New York Times v. Sullivan* or *Gertz*. Even assuming for purposes of argument that this claim raises self-censorship issues, the information involved is factual information which is easily verified. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 772 n. 24 (1976).

It is worth observing that D & B has operated without First Amendment protections for a great number of years in the credit reporting industry and seems to be flourishing. Thus, history infers that this entity has not

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[12]Even in the case of relatively non-controversial topics such as advertising, it has been observed that the media are generally more vulnerable to the chilling effects of government regulation because they have less financial interest than the advertisers in the distribution of any particular type of advertising. Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. of Chi. L. Rev. 205, 251 (1976) (hereinafter cited as Note, *First Amendment Protection).*

been chilled by threats of self-censorship caused by a lack of First Amendment protection.

Professor Anderson, after observing that the additional protections in *Gertz* may be more apparent than real since it is doubtful that there have been many substantial recoveries where there is no fault, takes the position that there are certain types of defendants "for whom in comparison with the press, the danger of self-censorship is less." Anderson, *supra*, at 442-43. Anderson identifies credit reporting agencies and business entities attacking the products or services of a competitor as examples of those who have a greater incentive to take risks than would the media publishing about similar issues. These entities should not be protected out of concerns for self-censorship. It is incongrous for D & B to claim that it might be susceptible to self-censorship when, after thriving for all these years without the protections it now claims it needs, it offers not one concrete example of a credit report it squelched out of a self-imposed "blue pencil".

*Hood v. Dun & Bradstreet, Inc.*, 482 F. 2d 25 (5th Cir.) *cert. denied* 415 U.S. 95 (1974) holds that commercial credit reporting agencies should not be afforded First Amendment protection in defamation cases. In addition to relying upon the commercial speech doctrine, the court in *Hood* evidenced serious doubts that such companies would be inhibited by self-censorship if First Amendment protections were withheld. Because the common law privilege extended to credit reporting agencies is predicated upon the theory that absent such privilege, such companies would be driven out of business by the cost of defamation suits, the court in *Hood*, in connection with the self-censorship argument, analyzed the status of credit reporting agencies in jurisdictions that have declined to apply the common law protection.



In Georgia, where credit reporting agencies have no common law privilege, such businesses exist and are thriving. Indeed, the *Hood* court noted that D & B does business in Georgia despite the lack of the privilege and one of the largest credit reporting agencies in the country, Retail Credit Company, is based in Georgia.

The court also referred to a study comparing the activities of credit reporting agencies in Idaho, where no common law privilege exists, with credit agencies in the state of Washington, where the privilege does exist. 482 F. 2d 32 at n. 19. The conclusions of that study that no real difference in credit agencies' activities could be perceived in the two states led the *Hood* court to the conclusion that there is apparently no inhibition from publishing such reports due to the lack of the protection of the privilege.

Fear of media self-censorship was one of the crucial factors asserted by the majority in *Gertz* to extend First Amendment protection to the media. In order to retain the viability of that rationale, an extension of *Gertz* to non-media defendants would therefore necessitate the conclusion that all defendants, media and non-media alike, fear defamation suits to such a degree that they would engage in intolerable self-censorship to deter defamation claims. There do not appear to be "hard facts to support that proposition." *Gertz*, supra at 390 (White, J., Dissenting) and what statistical data has been compiled would suggest a contrary conclusion. The American Bar Foundation's study of defamation litigation, which is abstracted at Appendix B, points out that constitutional privileges may not provide more protection for non-media defendants than common law protection. This study certainly

contradicts the plethora of imaginable horrors suggested by numerous amici briefs.[13]

A fair distillation of the above considerations yields the conclusion that fear of self-censorship, irrespective of its capacity for objective verification, impacts the media, as a category, in a disproportionate manner than non-media defendants. Greenmoss submits that fear of self-censorship is inapplicable to non-media defendants, especially D & B, and accordingly, a major doctrinal underpinning of *New York Times* and *Gertz* is inappropriate in such cases.

When comparing the impact *vel non* of self-censorship on non-media speakers, a final comment is approrpiate. In limiting suits for defamation, the impact is not felt by the populace. Rather, it falls directly and immediately on the defamed individual. If he is unable to obtain redress through the legal system because of First Amendment interests, the value of free speech is subsidized by those injured rather than by the *class* that benefits from a system of free expression. Once this tension is recognized, the difficulty of accepting free speech as an absolute covering all cases of defamation becomes apparent. By shielding all defendants out of concern for free expression, the burden of defamation is, therefore, placed on the party less capable of either avoiding or mitigating injury. *See,* Ingber, *Defamation, A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785, 795-96 (1979). *cf., Gertz, supra,* at 392 (White, J., Dissenting).

### C. Considerations of Content Regulation Are Inapposite To This Case.

D & B claims that the imposition of liability for its speech is grounded upon the content of that speech and

[13]See abstract of American Bar Foundation Study set forth herein at Appendix "B".



this creates a discrimination against that speech which, it suggests, is anathema to the concepts of the First Amendment.[14]

Literally construed, of course, the content argument would render powerless the right of government to deal with obscenity, *Roth v. U.S.*, 354 U.S. 476 (1969); child pornography, *New York v. Ferber,* 458 U.S. 747 (1982); commercial speech, *Central Hudson Gas & Electric Company v. Public Service Commission,* 447 U.S. 557 (1980) and other expressions with minimal social value including defamation.

*Bolger v. Young's Drug Products Corp.,* 103 S. Ct. 2875 (1983) points out that the court is more inclined to permit content-based restrictions when the expression at issue falls within certain categories such as defamation. 103 S. Ct. at 2880 n. 7.

On at least two occasions during the past term, the Court has indicated that the general principle which has emerged from the cases relied upon by D & B for its content-based argument is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. In *City of Los Angeles v. Vincent,* 104 S. Ct. 2118 (1984), the Court pointed out that:

> The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some *viewpoints or ideas* at the expense of others. 103 S. Ct. at 2128. (emphasis added).

Similarly, *Bose v. Consumer Union, supra,* construes *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972) as espousing the principle of viewpoint neutrality.

[14]Since this argument is advanced both in connection with the media/non-media issue and the commercial speech argument, Greenmoss' comments here are intended to apply to both issues.

The philosophy of viewpoint neutrality is to restrict the power of the majority from suppressing support for a minority party or an unpopular cause or to exclude the expression of certain points of view from the marketplace of ideas. Vincent, *supra,* at 2128. When applied to this case, the question that begs asking is what viewpoint, cause or idea does this speaker advance by this speech or indeed what viewpoint, cause or idea does the speech itself espouse? The speech involved here, a credit report, is just fact-based information devoid of any thesis or viewpoint. The speaker here does not identify any viewpoint that is inhibited by the regulation at issue here. This is because D & B simply doesn't have a viewpoint in selling this speech.

Imposing the common law of defamation on credit reports, does not raise, we submit, any hints of bias or censorship; there is no design to suppress ideas or the viewpoint of the speaker. Indeed, the defamation involved here is neutral concerning any speaker's point of view.

The development of the viewpoint neutrality rule or, as D & B puts it, content regulation, is instructive because the claim advanced here relies heavily on *Mosley, supra. Mosley* involved a Chicago ordinance that banned picketing within 150 feet of a school but exempted peaceful labor picketing. The ordinance was improper, this Court held, because it discriminated among pickets on the basis of subject matter. Increasing opposition to a broad content neutrality doctrine culminated in *Young v. American Mini Theater,* 427 U.S. 50 (1976) where a plurality of the Court concluded that the question whether speech is or it not protected "often" depends on its content. *Id.* at 66-70. The essence of the *Mosley* rule, it was said, related to the point of view expressed by the comment. In *New York v. Ferber,* 458 U.S. 747 (1982), a majority of the



court adopted this position. Justice Stevens, concurring in the judgment, advanced the view that "the question whether speech is protected by the First Amendment *always* requires *some* consideration of both its content and its context." *Id.* at 765. (Emphasis added).

The Court has increasingly upheld content based restrictions in the areas of commercial and sexually explicit speech. Note, *Content Regulation and the Dimensions of Free Expression,* 96 Harv. L. Rev. 1854, 1855 (1983). State regulation of commercial defamation gives rise to no general concern of partisan bias. What bothers those who do not like to make content distinctions is the uncomfortable fact that not every sale of speech deserves the kind of special speech or press protections that should displace significant state interests. Shiffrin, *supra,* at 1268 and n. 327.

Since the major concern about content neutrality is that the government should not play favorites with speakers whose ideas are in competition with each other, the question arises whether non-media speech in in competition with media speech. In D & B's case, even assuming that there is the sale of ideas rather than facts, we submit that it cannot be seriously argued that D & B in is competition with the press and broadcast media for the sale of credit reports or credit information. Concurring in the *Bolger* judgment, Justice Stevens described as offensive a viewpoint bias which excludes one advocate from a forum "to which adversaries have unlimited access." 103 S. Ct. at 2890. Since media and non-media speakers do not compete in the same forum, they should not be deemed adversaries. A media/non-media distinction simply doesn't have the exclusionary aspects derived from the state's efforts to suppress a specific point of view that calls into play content discrimination arguments. Profes-

sor Redish, who is critical of content distinction arguments in the first place, addresses this concern as follows:

> The most strained use of the equality prinicple is perhaps the suggestion that it should be employed to invalidate subject matter categorizations for purposes of First Amendment analysis. When distinctions are drawn between commercial and political speech, or between fighting words, libel, or obscenity and other forms of expression, it makes little sense to criticize the distinctions solely because different forms of speech are receiving unequal treatment. Such forms of expression do not compete with one another, as for example, do opposite positions on the Vietnam War or the defense budget. Those who do not receive protection for their commercial or libelous utterances are no worse off because other forms of speech are protected, and would be no better off if the other forms are also denied protection. This is not true when government prohibits the expression of only one viewpoint on a particular issue. In that case, the prohibited expression is harmed, in an equal protection sense, because competing views are allowed to be heard and would be better off if the competing views were also prohibited.

Redish, *The Content Distinction in First Amendment Analysis,* 34 Stan. L. Rev., 113, 139 (1981).

Even if D & B contends it competes with the media, the *Gertz* rule does not favor one viewpoint over another because the press, in circulating information, is not always espousing a viewpoint. The difficulties in applying viewpoint discrimination arguments here further highlight our position that the rules in *Gertz* were formulated and should be used only where the media is concerned. Those rules should not be expanded beyond those for whom they were crafted.

D & B infers that it uses the same medium for expression as the press, presumptively claiming that it is "the media" according to an unexplained definition of that



term. It also claims that in all but the most obvious cases, it is impossible to apply a media/non-media distinction. On the contrary, we believe workable description of the press and broadcast media can be utilized to establish a bright line of demarcation in all but a very few limited cases.[15]

Greenmoss does not propose to offer an all inclusive definition of the "media" but does feel a responsibility to suggest guidelines for analytical distinction. Any disseminator of printed material should not automatically be considered "the media". One who duplicates a document and passes it around the office would feel strange to be regarded as the "media" or the "press." The general distinguishing factor should be publication or acts leading to general dissemination to the public at large. *See Nimmer, supra,* at 552. Stated otherwise, the publisher, in order to be a media defendant, should not, by his actions or the structure of his distribution system, inhibit public access to the material. There should be no significant facts pointing to a discouragement of public access to the publication. In other contexts, the Court has had minimal difficulty describing what is meant by the media for purposes of those cases.[16] *See* e.g., *Saxe v. The Washington Post,* 417 U.S. 843 (1974).

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[15]The media/non-media distinction comes into play only in the event that the plaintiff is not a public figure or public official. In those instances, *New York Times* protection applies irrespective of the status of the defendant. It is only where the plaintiff is a private plaintiff, as contrasted with a public figure or public official that the status of the defendant becomes relevant and the media/non-media distinction comes into play. *See* Eaton, *supra,* 1406 and cases cited therein.

[16]It has been suggested that *Gertz and Miami Herald Publishing v. Tornillo,* 418 U.S. 241 (1974), taken together, may be viewed as insisting that the government refrain from interfering with the day-to-day editorial decisions of the press. *See Ingber,* supra, at 849-850. D & B engages in no editorial functions in connection with these reports.

## II. The Commercial Speech Doctrine, Though Narrower Than "Speech Of A Commercial Or Economic Nature", Applies To The Speech In This Case.

The question of what constitutes commercial speech has been before this Court since 1942 when it held that commercial speech was entirely without First Amendment protection. *Valentine v. Chrestensen,* 316 U.S. 52 (1942). In 1976, the Court modified its position. It afforded limited First Amendment protection to commercial speech, holding that it is not wholly outside the protection of the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.,* 425 U.S. 748 (1976). Unlike speech such as political speech and speech relevant to the operation of democratic institutions which is subject to full First Amendment protection because of the essential role it plays in the function of a democracy, commercial speech derives what constitutional value it receives solely because of the role it plays in our free enterprise economy where the allocation of our resources in large measure will be made through numerous private economic decisions. *Virginia Pharmacy, supra,* 425 U.S. at 765. Emerson has suggested a demarcation point which recognizes that "communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression." Emerson, *Toward A General Theory of the First Amendment,* 72 Yale L. J., 877, 949 (1963).

The aphorisms D & B uses to explain why speech of a commercial nature should receive *full* First Amendment protection have already been considered by the Court in deciding whether to give commercial speech *any* First Amendment protection. To reintroduce those considerations in an attempt to afford commercial speech full constitutional protection is just a form of applying a multiplier to the same considerations that give this category of speech some constitutional protection in the first place.[17]



D & B says what its speech is not but gives little attention to what its speech is. It asserts that what is involved here may be "speech about commerce" or "financial reports".[18]

For analytical purposes, it is more instructive to simply say what these reports are. They are business credit reports. The report involved here contained exclusively factual information about the present business condition of Greenmoss. The report constituted fact based information solely about business.

The Court has not defined commercial speech and efforts to do so have proved elusive. The precise boundaries of commercial speech have not been demarcated. Greenmoss is not aware of any case in which the Court has specifically ruled that certain speech is not commercial speech. We do not believe that the Court has limited commercial speech solely to product or service advertising and closely related methods of commercial solicitation. Certainly there is nothing in the decisions which analyze the doctrine of commercial speech which requires that commercial speech be limited to advertising.

As we have indicated previously, a substantial and consistent body of precedent has developed in the federal

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[17]In rejecting the claim that First Amendment concerns should enter into analysis of jurisdictional issues in defamation cases involving the media, a unanimous court in *Calder v. Jones,* 104 S. Ct. 1483 (1984) noted that such considerations are already taken into account in applying the Constitution to substantive law. "To reintroduce those concerns (at the jurisdictional stage) would be a form of double counting." 104 S. Ct. at 1488 (1984).

[18]See Supplemental Brief of Respondent on Reargument 41, n. 27, 43.

and state courts placing credit reports within the category of commercial speech.[19] Our research has uncovered no lower court decision rejecting the suggestion that credit reports constitute commercial speech. Even under the expansive test utilized by the plurality in *Rosenbloom,* Justice Brennan pointed out that no views were expressed therein on the extent of constitutional protection, if any, for purely commercial communications made in the course of business. 403 U.S. at 44 n. 12.

The Court's opinion in *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) contains at least some inference that credit reports may be within the commercial speech classification. (protection of *New York Times* may not be needed for commercial speech citing *Dun & Bradstreet v. Grove,* 438 F. 2d 433 (3d Cir. cert. denied, 404 U.S. 898 (1971)). 436 U.S. at 464.

Any effort to include particular speech within the rubric of commercial speech must begin with the recognition that "commercial speech is linked inextricably to commercial activity." *Friedman v. Rogers,* 440 U.S. 1, 10 n. 9 (1979). Publications which do no more than "inform private economic decisions" have been held to constitute such speech. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980).

The orderly development of the commercial speech doctrine is necessary so that government power to regulate commercial activity deemed harmful to the public is not frustrated merely because "speech is a component of that activity." *Ohralik, supra,* 436 U.S. at 447. As examples of speech which are constitutionally subject to

[19]Brief of Respondent at 17-18. A comprehensive comment on First Amendment protection for commercial advertising concludes that most factors relevant in the First Amendment status of business advertising apply in contexts such as the First Amendment status of business credit reports. Note, *First Amendment Protection, supra,* 205, 206-07 n. 15.



regulation due to their relation to commercial activity, the Court in *Ohralik* cited the exchange of information about securities (citing *SEC v. Texas Gulf Sulphur Company,* 401 F. 2d 833 (2d Cir.) *cert. denied,* 394 U.S. 976 (1969), corporate proxy statements (citing *Mills v. Electric Auto Light Company,* 396 U.S. 375 (1970)) and the exchange of price and product information among competitors (citing *American Column and Lumber Company v. United States,* 257 U.S. 377 (1921). Id. at 456.

A holding that commercial speech is limited to "advertising and closely related methods of commercial solicitation", as D & B claims, or a holding that these credit reports, which are fact based reports solely about the present business condition of a commercial enterprise, are not within the commercial speech doctrine could call into question the government's power to regulate where speech is a component of commercial activity. *(See* Tr. Oral Argument 12-13).

In fact, such issues are presently before at least two courts of appeal. *See SEC v. Lowe,* 725 F. 2d 892 (2d Cir. 1984), *cert. pending,* No. 83-1911, 53 LW 3020 (1984): *See SEC v. Suter,* No. 83-1452 (7th Cir. April 13, 1984).

*Lowe* involved the revocation of an investment advisor's registration under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 et seq., and an injunction against the publication of newsletters which contained factual as well as advisory information. Lowe's argument for full First Amendment protection for such publications was remarkably similar to that advanced here.[20]

[20]Lowe claimed that commercial speech included only direct product or service advertising and a seller's indirect informational advertising. Further, since Lowe reported about products which he did not offer himself and provided data about products offered by others, he claimed the newsletters could not be commercial speech. 725 F. 2d at 900. *Compare* Supplemental Brief of Petitioner on Reargument at 8, 40-42.

The Second Circuit, in an opinion by Judge Oakes, rejected this claim, holding that this Court's definitions of commercial speech do not limit commercial speech to product or service advertising and are broad enough to sustain the SEC's power to regulate and enjoin publication of those newsletters on the ground that they were commercial speech. 725 F. 2d 900-01. The opinion emphasized that content must supersede form in distinguishing commercial speech, citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 363 (1977) and *Virginia State Board of Pharmacy, supra.*

*Lowe* finds commercial speech present where the speaker, familiar with business related matters in a particular industry, reports about data relevant to that industry to those who will use it for their own private economic decisions.

This leads to a discussion of *Bolger v. Young's Drug Products Corporation,* 103 S. Ct. 2875 (1983). In *Bolger,* the Court held that informational material broadly categorized as advertisements constituted commerical speech.[21] In *Bolger,* the Court moved away from the idea that speech which does no more than propose a commercial transaction is an indispensable ingredient to placing speech in the commercial speech category.[22] The Court

[21]One of the informational pamphlets discussed the issue of venereal disease in general terms and referred to the manufacturer only once at the very end of the material. It did not, for all that appears, directly suggest that the reader buy products made by Young's. See 103 S. Ct. at 2879 n. 4 and 2881 n. 13.

[22]"Young's Information Pamphlet . . . cannot be characterized merely as proposals to engage in commercial transactions." 103 S. Ct. at 2881. The "proposal of a commercial transaction" advanced by the Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973) "was probably not intended as an exclusive definition but only as a description of a prototypical form of commercial speech." Note, *First Amendment Protection,* supra, at 211.



posited that the mere fact that these pamphlets are conceded to be advertisements does not compel the conclusion that they are commercial speech. Therefore, not all advertisements are commercial speech[23] and commercial speech is not just "all advertising."

Secondly, *Bolger* advanced the notion that reference to a specific product does not by itself render material commercial speech. Indeed, the Court expressly disclaimed any opinion on whether reference to a particular product or service is a necessary element of commercial speech. 103 S. Ct. 2882 at n. 14.

Finally, *Bolger* noted that although economic motivation *by itself* does not turn material into commercial speech, the combination of all three considerations yielded the conclusion that Young's publications were commercial speech.

We suggest that commercial speech is a concept predicated on the informational process. The speaker participates in an informational process whereby the audience is assisted, directly or indirectly, in forming commitments which are potentially part of a contract of sale or service. *See* e.g. Note: *Reuniting Commercial Speech and Due Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers,* 57 Tex. L. Rev. 1456, 1459, n. 18 (1979). When the speaker's actions have no other motivation than the incentive for monetary gain, the categori-

[23]In *New York Times,* Justice Brennan drew a line between purely commercial and "editorial" advertising which expressed opinion and sought support "concerning matters of the highest public interest and concern". 376 U.S. at 266. Using self-censorship analysis, the Court feared that any other conclusion would discourage newspapers from carrying such ideas and shut off an important outlet from people who do not have access to publishing facilities. Id. This bolsters our view that commercial speech is not just advertising and commercial solicitation.

zation of that speech as commercial speech is more appropriate but is, of course, not compelled. In this sense, when other factors are present, the primacy of the speaker's economic motivation should make downweight.

The combination of a particular profit motive and of content and subject matter triggers the categorization of commercial speech. Although economic motivation alone should never be sufficient to classify speech as commercial speech and commercial content or subject matter alone should be insufficient, the combination of selling fact-based information about business for no motive other than profit should place this type of speech into the commercial category. *See SEC v. Lowe, supra;* Note, *Constitutional Protection of Commercial Speech,* 82 Colum. L. Rev. 720, n. 2 (1982); *Shiffrin, supra,* 1258.

One important caveat is that speech which disseminates information about an activity itself protected by the First Amendment should not, absent exigent circumstances, be categorized as commercial speech. *Bolger v. Young Products, supra,* 103 S. Ct. 2882 at n. 14; Note, *First Amendment Protection, supra,* at 236.

Because speech which is economic or commercial in nature does not, of necessity, have the two features outlined above, it is both too underinclusive and too overinclusive to justify its placement in a category of depreciated First Amendment speech.[24] A generalized definition such as speech that is commercial or economic in nature would not, we think, have sufficiently narrow limits. Speech which is economic or commercial in nature, without more, could involve speech by a taxpayer concerning political decisions such as taxation by government. While including credit reports, this definition could also include too

[24]It is difficult on the facts of *Bolger* to conclude that the speech was economic or commercial in nature and it does not appear that the Court so characterized it.



many other things which contribute to political dialogue and the functioning of democratic institutions.

The common ground between advertising and credit reports, recognized by D & B, is that they both convey information.[25] Many advertisers simply convey information and leave it to the audience to judge the relative advantage of its product over a competitor's. *cf. Bolger v. Young's Products, supra.* Therefore, contrary to providing a distinguishing factor, this consideration supports the conclusion that business credit reports should be commercial speech.

D & B claims that when a statement about a firm, product or service is made by someone other than its seller, the state's interest in regulating disappears and implies that statements which serve solely an informative function should receive full First Amendment protection.

This argument fails to consider the holding of *Pittsburgh Press Company, supra,* that a newspaper's publication of want ads placed in the classified section of the paper constitute commercial speech. The Pittsburgh Press clearly had not proposed a commercial transaction between its readers and itself nor had it discussed its own product. Rather, it had published the employment proposals of others for a fee. The distribution of this speech, which was informational in nature, whereby the speaker assisted the audience in forming commitments leading to a contract, joined with the fact that the speaker performed such action out of profit based motives resulted in the Court placing the speech in the commercial category.

Thus, *Pittsburgh Press* nullifies any claim that speech about one's own product is the *sine qua non* of commercial speech. In *Bolger,* the commercial speaker's state-

[25]Supplemental Brief of Petitioner on Reargument at 41 n. 27. See also, Amicus Brief of Dow Jones Company at 11.

ments about its own products were minimal at best. If such were the test, advertising which compared the speaker's product or service with a competitor's could take the speech out of the commercial speech category. Comparative information dissemination always necessitates that the speaker discuss facts or features about someone else or someone else's product or service. Like credit reports, this information is usually fact based, tends to have objective parameters and is easily verified. The reports here deal with tangible items that are easily susceptible to empirical testing. They are in large part drawn from official documents often prepared by the target of the speech itself such as annual reports filed with state corporation departments (Tr. 352-53). Therefore, credit reporting agencies have, generally speaking, better and easier access to facts than do, for example, the media whose access to facts may be drawn from sketchy or conflicting sources. The "informational function" of advertising, not the business of advertising itself, prompted the commercial speech categorization in *Central Hudson Gas & Electric Corporation v. Public Service Commission,* 447 U.S. 557 (1980).

Any suggestion that credit reporting agencies have to assemble these facts under time pressures, thus making them more like newspapers than advertising, is clearly outweighed by the need for accuracy.[26] The risk of harm to someone else's personal or property interests, of course, increases the level of accuracy needed in the verification process but does not alter the conceptual simplicity of that process.

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[26]False commercial speech does not assist the consumer in making the proper economic decision. *See Virginia Board of Pharmacy, supra,* 425 U.S. at 771-72. In this case, D & B offered no evidence at trial that checking the accuracy of such reports (as its procedures required) would have delayed its circulation.



D & B fails to explain why it is acceptable that a speaker's economic motive to disseminate advertising renders that speech "hardy" but those same motives cannot render other speech hardy.[27] A business which decides to attack a competitor's product or service in order to prevail in a competitive bidding contest probably engages in a type of speech which would be characterized as "hardy". The speaker has decided in that case that the potential reward merits the risk. The rough and tumble of the business contest does not need First Amendment protection in order to invigorate the speech.

These considerations point to the futility of attempting to maintain a general constitutional distinction between commercial advertising and other commercial activity. Cox, *The Supreme Court 1979 Term—Foreward—: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 33 (1980). In short, the speech here, merely because it is not advertising, should not be determined to be non-commercial speech or speech entitled to full First Amendment protections. In terms of political decision making, the contribution to political dialogue and the operation of democratic institutions, these fact-based information reports about business are not more, and probably less important than a host of other market activities that states may ban entirely if they are false or potentially misleading. *cf.* Jackson and Jeffries, *Commercial Speech, Economic Due Process and the First Amendment,* 65 Va. L. Rev. 1, 18 (1979).

No matter how expressed, a ruling which does not analyze or accept this speech as commercial speech will

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[27]Supplemental Brief of Petitioner on Reargument at 47 n. 27. D & B's assumption seems to be that media speech can never be commercial speech. The Court had no trouble rejecting that approach in *Pittsburgh Press. See, Note, First Amendment Protection, supra,* at 212.

justify lower courts in concluding that credit reports and reports closely analogous thereto are not commercial speech and may signal an end to the continuing development of a comprehensive commercial speech doctrine.

It will also signify a ruling that false statements of fact do have constitutional value. In *Bose v. Consumers Union of United States, Inc., supra,* the Court noted that false and misleading commercial speech could be deemed to represent a category of unprotected speech. "The rationale for doing so would be essentially the same as that involved in the libel area, *viz.,* there is no constitutional value in false statements of fact." 104 S. Ct. at 1961-62 n. 22. A ruling that business credit reporting agencies which distribute false factual reports may be regulated by the states in at least the three tiered manner undertaken by the trial court would be entirely consistent with that approach.

Comparing D & B's speech here with other forms of speech such as "media speech", yields some common sense distinctions between them. The reader or viewer of media offerings hopes and is probably optimistic that the facts contained in the presentation are at least reasonably accurate. This would, of course, be the goal of any responsible journalist. But the public is sufficiently sophisticated to know that this is not always the case and, therefore, it can safely be said that the public tempers its wholesale acceptance of the veracity of media speech. Because the media serves the function of stimulating ideas, however, we tolerate these errors of fact in order to propagate the diversity of ideas. We submit that credit reporting companies are vastly different. Business decisions which are weighty to the recipients of these reports are made in reliance upon them. The recipient does not want to be stimulated by ideas; he is buying specific factual data which credit reporting companies sell. These facts



assist the recipient in making his own economic decisions which decisions do not affect the credit reporting company but rather affect the business and credit relationship between the recipient and the target of the report.[28] The recipient wants and needs nothing more than accuracy in these reports. This past term, the Court recognized a fundamental precept that has special relevance here. "False statements of fact harm both the subject of the falsehood *and* the readers of the statement." *Keeton v. Hustler Magazine, Inc.,* 104 S. Ct. 1473 at 1479 (1984) (emphasis in original).

Despite everything that can be said to the contrary, granting D & B the "limited relief" it seeks here, namely, the same protection the media publisher in *Gertz* received for an article having as its thesis a nationwide conspiracy against the police, will elevate the speech in this case to the same status as political speech about matters of the highest public concern and will have no other effect than to trivilalize the First Amendment. Lower courts could not help but miss the message that credit reports, despite the unanimous authority of the lower federal courts to the contrary, are not commercial speech. An equally disconcerting message will be that irrespective of the relevance of the speech to "core notions" of the First Amendment, the *New York Times/Gertz* rules apply.

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[28]It was in this sense that we have previously stated that these reports are not solely in the economic interest of the speaker and audience. This speech is, of course, made solely in the economic interest of the speaker as respects his motive for dissemination but not in conjunction with any transaction, actual or potential, between speaker and audience. The audience's economic interest in this speech is solely in conjunction with a transaction between the audience and the target of the speech. If the prototypical description of commercial speech is to be retained, "predominantly" should perhaps be substituted for "solely". Shiffrin, *supra,* at 711. *cf. Roberts v. United States Jaycees,* 104 S. Ct. 3244, 3259 (1984) (O'Conner, J., Concurring).

To accept the proposition D & B advances would avoid the need to draw any lines because the coverage of the First Amendment would not simply be elastic; it would be infinite. The specter of line drawing is a theme D & B repeatedly emphasizes.[29] We do not believe that this is a reason sufficient to abandon the inquiry entirely. To withdraw an entire field from the opportunity to make analytical distinctions because doing so removes the need for inquiry in the future contradicts the concept of restraint in the exercise of judicial review. *Jackson* and *Jeffries, supra,* at 20; Bork, *Neutral Principles and First Amendment Problems,* 47 Ind. L.J. 1, 28 (1971). We believe that the commercial speech doctrine, when applied as we have suggested above, can offer principled dividing lines without concern for partisan bias.

In related areas, the Court has drawn such lines. *Connick v. Myers, supra,* (speech of public employees made in their employment capacity not touching on matters of public concern is unprotected under the First Amendment); *NLRB v. Gissell Packing Corporation,* 395 U.S. 575, 618 (1969) (all speech of participants in labor disputes is not protected merely because some of it is protected).

This is not to say that commercial speech does not have substantial First Amendment protections. When commercial speech is true and not misleading, it can receive significant First Amendment protection. *Bolger v. Young's Products, supra, Virginia Board of Pharmacy, supra.* We do not suggest a simplistic, two-level theory which posits that credit reports, as commercial speech, are *per se* unprotected. *cf.,* Note, *First Amendment Protec-*

[29]Perhaps it is because D & B wants no lines to be drawn that it offers no suggestions as to how to define commercial speech or distinguish media from non-media defendants.



*tions, supra,* at 213-18. Our earlier brief reviewed the factors which showed that the governmental interest behind the three-tiered approach utilized by the trial Court strongly outweighed the minimal First Amendment value of such speech.[30]

However, since false and misleading commercial speech assists no one in arriving at correct economic decisions and since those decisions are on a lower constitutional rung in the first place, strong reasons to place false and misleading commercial speech in an unprotected category exist. Since the *mens rea* requirement in *Gertz* of actual fault is grounded on the potential chilling effect that large damage awards could have on the media in reporting true information of public interest, the *mens rea* requirement can be dispensed with in regulating false and misleading commercial speech. The trial Court's method of permitting only nominal damages after a threshhold showing of fault had been made by Greenmoss exceeds this standard. As indicated previously, Greenmoss had to and did prove by a preponderance of the evidence that it had in fact been harmed in order to receive its compensatory damage verdict. Thus, the level of protection afforded this speech was at least commensurate with its subordinate position in the scale of First Amendment values. *See Ohralik, supra,* 436 U.S. at 455-56; *See Jackson & Jeffries, supra,* at 24, 38.

In *Ohralik,* the Court rejected an argument that actual injury was necessary before a state could regulate false and misleading commercial speech. Similarly, in *Friedman v. Rogers, supra,* the potential for deceptiveness was sufficient to justify regulation without proof that any recipient of the information had been deceived. The diver-

[30]Respondent's Brief at 20-22.

sity of factual situations in which the commercial speech doctrine has arisen and the consistent holdings of the lower federal courts applying the commercial speech doctrine to defamation actions affords no basis for distinguishing tort litigation from government efforts to regulate. Both are designed to protect citizens from harm caused by anti-social conduct. As one example of the diverse factual patterns in which the commercial speech doctrine arises, in *Ohralik, supra,* the suspension of an attorney to practice law served as the springboard for the commercial speech doctrine.

In summary, we do not believe that "speech that is of a commercial or economic nature" should be the definitional framework for placing speech that is false or misleading in an unprotected category under the commercial speech doctrine. However, the narrower tests which we have analyzed and proposed herein should, at minimum, include the credit reports at issue in this case.

## CONCLUSION

Based on the foregoing, Greenmoss respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated at Burlington, Vermont this 22nd day of August, 1984.

Respectfully submitted,

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## APPENDIX A

### Ad Damnum Considerations

First, Greenmoss was aware that the news media makes a customary practice of publishing, on a selective basis, certain new court filings in the Washington County (Vermont) Superior Court. This court is located in the capitol city of Vermont (Montpelier) and several news bureaus are situated in close proximity to the Courthouse. Litigation involving Dun & Bradstreet, especially one with a high *ad damnum* in the Complaint, could well cause unnecessary attention to the litigation and inject tangential issues into the trial. Secondly, the area served by the Washington Superior Court is relatively small in population and the Court, in the exercise of economy, often selects small panels for jury selection. A potential juror's previous knowledge about a case on account of his reading press reports about it could lead to his disqualification and thus render ineligible an otherwise qualified juror. For these reasons, the decision was made to assert an amount in the *ad damnum* which would be less likely to attract undue attention and publicity. Additionally, the Complaint was filed in October, 1977 and several of the post-defamation activies of D & B which Greenmoss claimed were oppressive took place after the filing of the Complaint. For a review of these activities, see Brief of Respondent at 2-5.

Finally, after discovery was completed, Greenmoss moved to amend its *ad damnum* to seek $300,000 in damages. *See* Motion to Amend Complaint dated March 3, 1980 and Plaintiff's Counsel's letter to the Washington Superior Court dated March 24, 1980.

## APPENDIX B

Under a grant from the American Bar Foundation, a study of defamation litigation was performed analyzing cases over a 3½ year period. Franklin, *supra,* at 459.

The starting point of the study was selected to allow lower courts to assimilate the *Gertz* decision (Franklin, *supra,* at 459.) Libel litigation appears to be a very small percentage of all litigation, comprising some 0.36% of reported cases (459). *The most striking feature of the study was the plaintiffs' low success ratio which Franklin characterized as 5% of the media cases and 12% of the non-media cases* (476, 497-500). Because of nearly equal success ratios on appear, the study concluded that state law provided strong protection for non-media defendants (489). The media defendants' advantages and constitutional privileges were counterbalanced by the non-media defendants' greater reliance on state law privileges (471). The data gave support to the hypothesis that *constitutional privileges might not play as great a role in litigation as their predominance in legal literature might suggest* (465, 498-499). Media defendants were defined as those engaged in newspaper, magazine or book publishing or in broadcasting. (465). Non-media defendants were categorized as past employers, business-professional, governmental units (which three groups accounted for two thirds of all non-media defendants), corporations, creditors, present employers, labor unions and credit reporting companies (which accounted for approximately 2% of all non-media cases) (471-72 n. 39, 479 and n. 57). 31% of all cases involved media defendants and 69% of the cases were non-media defendants (465).